

Decision 04-10-018 October 28, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Pacific Gas and Electric Company (U 39 M) for Authority Pursuant to Public Utilities Code Section 851 to Grant an Easement to Sunrise Power Company, LLC for Transmission Facilities.

Application 04-01-016
(Filed January 15, 2004)

**OPINION ADDRESSING PACIFIC GAS AND ELECTRIC COMPANY'S
SECTION 851 APPLICATION FOR AUTHORITY TO GRANT AN EASEMENT
FOR TRANSMISSION INTERCONNECTION FACILITIES
TO SUNRISE POWER COMPANY, LLC**

A. Summary

We grant the unopposed application of Pacific Gas and Electric Company (PG&E) for authority under Public Utilities Code Section 851 (Section 851) to grant an easement to Sunrise Power Company, LLC (Sunrise) for interconnection facilities. These facilities would be on property in Kern County, California where PG&E has previously granted certain rights to La Paloma Generating Company, LLC, an agent for La Paloma Generating Trust, Ltd. (La Paloma) for a generation interconnection crossing PG&E property at Midway Substation near the City of Buttonwillow.¹ In connection with Sunrise's project to expand its generating

¹ These generation lines were constructed by La Paloma and are jointly owned and used by La Paloma and Sunrise pursuant to a Joint Interconnection Facilities Agreement (JIFA). Pursuant to the JIFA, La Paloma assigned Sunrise an undivided 23.75% tenancy-in-common interest in the existing agreement and when Sunrise completes its planned

Footnote continued on next page

capacity from 340 megawatts (MW) to approximately 570 MW, certain interconnection facilities that are jointly owned by La Paloma and Sunrise will require relocation. The easement will grant a non-exclusive right to Sunrise to install, suspend, repair, replace, remove, maintain, and use two 230-kilovolt (kV) electrical transmission lines, together with a non-exclusive right to construct, install, repair, reconstruct, replace, remove, maintain, and use a line of towers and related facilities.

The California Energy Commission (CEC) is the Lead Agency for the Sunrise Power Project under the California Environmental Quality Act (CEQA). The Commission has reviewed the CEC's environmental documents and finds them to be adequate for our decision-making purposes. We find the proposed easement is in the public interest as it will allow for additional interconnection facilities that will enhance the reliability of electric service to California's utility customers in addition to enabling an increase in the electricity supply available to California consumers in an efficient and environmentally sound manner.

B. Section 851

Section 851 requires Commission approval before a utility can sell, lease, assign, mortgage, or otherwise encumber the whole or any part of its property that is necessary or useful in the performance of its duties to the public. Under the proposed easement (Appendix B to the application), PG&E reserves the right to restrict access to the easement area or any portion or portions thereof when PG&E deems it advisable to do so, including in connection with events and

new transmission facilities it will assign an 76.25% undivided tenancy-in-common interest in its requested easement with PG&E to La Paloma.

emergencies occurring or affecting PG&E's utility operations located elsewhere than in the immediate vicinity of the property.

PG&E asserts that the proposed easement will not interfere in any way with the operation of PG&E's facilities, or with the provision of service to PG&E's customers and, in fact, will allow for additional interconnection facilities that will enhance the reliability of electric service to California's utility customers in addition to enabling an increase in the electricity supply available to California consumers.

In its application, PG&E states that the ratemaking treatment for easement is subject to the Federal Energy Regulatory Commission ratemaking and accounting treatment for transmission service and that this is an existing service included under T.C.4 in PG&E's Advice Letter 2063-G/1741-E. Clarification was later provided by PG&E's counsel that for this easement PG&E will be receiving a one-time payment of \$1,500 and that a revenue sharing mechanism would apply that shared the forecast net revenues equally between ratepayers and shareholders.

Based on the facts above, we find the proposed easement to be in the public interest.

C. Environmental Review

CEQA (Public Resources Code Sections 21000 et seq.) applies to discretionary projects to be carried out or approved by public agencies. A basic purpose of CEQA is to "inform governmental decision-makers and the public about the potential significant environmental effects of the proposed activities." (Title 14 of the California Code of Regulations, hereafter CEQA Guidelines, Section 15002.)

Because the Commission must issue a discretionary decision (i.e., grant Section 851 authority) without which the proposed activity will not proceed, the Commission must act as either a Lead or Responsible Agency under CEQA. The Lead Agency is the public agency with the greatest responsibility for supervising or approving the project as a whole (CEQA Guidelines, Section 15051(b)).

Here, the CEC is the Lead Agency under CEQA for the Sunrise Power Project and related interconnection facilities at the Midway-Buttonwillow PG&E substation. The original Sunrise Power Project certification was granted by the CEC on December 6, 2000, for a simple-cycle natural gas 320-MW power plant. The CEC subsequently certified conversion of the simple-cycle facility to a combined-cycle plant. (98-AFC-4C.) The Commission is a Responsible Agency for the project under CEQA. CEQA requires that the Commission consider the environmental consequences of a project that is subject to its discretionary approval. In particular, the Commission must consider the Lead Agency's environmental documents and findings before acting upon or approving the project. The specific activities a Responsible Agency must conduct are contained in CEQA Guidelines, Section 15096.

In this application, PG&E requests that the Commission find that modification of the interconnection at the Midway-Buttonwillow PG&E substation is exempt from CEQA review. In support of its request, PG&E has provided the Notice of Exemption (NOE) for the interconnection modification submitted by the CEC to the State Clearing House on February 24, 2003. We have reviewed the NOE as well as 98-AFC-4C and find these documents adequate for our decision-making purposes.

The NOE encompasses the relocation of one of the two existing La Paloma/Sunrise 230-kV circuits, addition of a new bay, switches, and relay,

addition of four new transmission towers, rerouting a segment of existing roadway, and construction of a new perimeter fence under the new transmission line. The NOE specifies that all modifications will occur within the existing boundaries of the substation and are necessary to minimize potential for transmission system overload due to the additional load from the Sunrise's combined-cycle expansion project. The CEC determined that the modifications are exempt because they are contained within the existing substation facility and will result in only a negligible expansion of existing use pursuant to CEQA exemption 15301(b). It is our understanding that the Section 851 approval sought by this application would approve the easement needed for these activities to be performed.

We find that the CEC reasonably concluded that the substation interconnection modifications described above are exempt from further CEQA review and we adopt that finding for purposes of our approval.

We also note that PG&E claims activities performed under the March 8, 2000 easement were consistent with General Order (GO) 69-C and thus did not require Commission approval because, unlike the present easement, the March 8, 2000 easement was revocable and thus appropriate for GO 69-C treatment.

PG&E's March 8, 2000 easement allowed the construction of two 230-kV generation tie lines. This is an activity which has the potential for resulting in either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment consistent with CEQA Guidelines, Section 15378. Placing language in the easement to state the easement is "revocable" is not a determining factor. PG&E's statement in this application that proceeding under GO 69-C for its earlier easement was valid based on prior decisions that sanctioned agreements under GO 69-C is based on an incomplete

analysis. PG&E cites to 1999 and 1998 cases that involve fiber optic cable leases that share existing utility facilities. These are instances where only minor alteration of existing facilities occurred and it could be seen with a degree of certainty that there was no possibility that the proposal may have a significant effect on the environment. We find it puzzling that PG&E does not cite or discuss Decision (D.) 00-12-006.

In D.00-12-006, the Commission articulated that GO 69-C's provisions regarding "limited use" of utility facilities do not extend to the use of new facilities that are to be constructed without the benefit of CEQA review; agreements that provide for new construction with the potential to result in significant changes in the physical environment require a Section 851 application.

While D.00-12-006 has provided clear direction for all transactions after January 1, 2001, PG&E's earlier easement was finalized in March 2000. Based on this timing, it is reasonable to conclude that it may not have been clear to PG&E at the time it negotiated the easement that a Section 851 application was needed. PG&E has followed the correct procedure in filing a Section 851 application here for its new easement. Therefore, while PG&E's March 8, 2000 easement should have been processed as a Section 851 application rather than under GO 69-C, we should not sanction PG&E for its behavior or require removal of the transmission lines installed.

D. Categorization and Need for Hearings

In Resolution ALJ 176-3127 dated January 22, 2004, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were necessary. No protests have been received. Given this status public hearing is not necessary and the preliminary

determination for the need of hearings made in Resolution ALJ 176-3127 is changed.

E. Waiver of Comment Period

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Public Utilities Code Section 311(g)(2), the otherwise applicable 30-day period for public review and comment is being waived.

F. Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner and Christine M. Walwyn is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. The proposed easement is in the public interest.
2. The CEC is a Lead Agency for the Sunrise Power Project under CEQA.
3. On February 24, 2003, the CEC issued an NOE to the State Clearing House determining that the interconnection modification at PG&E's Midway-Buttonwillow substation related to the Sunrise Power Project is exempt from CEQA pursuant to CEQA Guidelines, Section 15301(b).
4. The Commission is a Responsible Agency for the project under CEQA.
5. PG&E entered into its March 8, 2000 easement for the Sunrise project without prior Commission approval or CEQA review. This easement allowed the construction of two 230-kV generation tie lines, an activity which has the potential for resulting in either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment.

Conclusions of Law

1. PG&E has properly filed this easement request as a Section 851 application.

2. We have reviewed the CEC's environmental documents and find them to be adequate for our decision-making purposes.

3. We find that the CEC reasonably concluded that the interconnection modifications described for PG&E's Midway-Buttonwillow substation are exempt from CEQA pursuant to CEQA Guidelines, Section 15301(b) and we adopt the CEC's findings for purposes of our approval.

4. We should approve the proposed easement.

5. PG&E's March 8, 2000 easement should have been filed as a Section 851 application and been given an environmental review prior to the start of construction.

6. It is reasonable to conclude that prior to the Commission issuing D.00-12-006, it may not have been clear to PG&E that a Section 851 application was needed. Therefore, we should not sanction PG&E for its earlier behavior or require removal of the transmission lines installed.

7. The preliminary determination for the need of hearings made on Resolution ALJ 176-3127 is changed from yes to no.

O R D E R

IT IS ORDERED that:

1. The application of Pacific Gas and Electric Company (PG&E) for authority under Public Utilities Code Section 851 to grant an easement to Sunrise Power Company, LLC for a transmission interconnection crossing PG&E's property at Midway Substation near the City of Buttonwillow, as set forth in Appendix B of its application, is granted.

2. PG&E shall notify the Director of the Commission's Energy Division in writing of any amendment, extension, or termination of the easement within 30 days after such amendment, extension, or termination is executed.

3. No hearings are necessary.
4. This proceeding is closed.

This order is effective today.

Dated October 28, 2004, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners

I reserve the right to file a dissent.

/s/ CARL W. WOOD
Commissioner

I reserve the right to file a dissent.

/s/ LORETTA M. LYNCH
Commissioner

Dissenting Opinion of Commissioner Carl Wood
Item 5 Section 851 Approval for Sunrise Power 230 kV Line

PG&E allowed a private entity to construct a 230 kV transmission line on its property without seeking and gaining this commission's approval of this major encumbrance of utility property. PG&E argues that it did not need to seek approval under Section 851 because the easement that it granted Sunrise for this purposed was revocable, and therefore exempt from Section 851 pursuant to General Order 69-C.

This argument does not pass the giggle test. General Order 69-C applies to temporary structures. Here, we are not dealing with a circus tent that can be collapsed and moved to the next town, or a trailer that can be wheeled off-site. We are dealing with massive transmission towers and the energy reliability expectations that accompany their construction. This use is temporary and revocable only in the senses that all buildings are temporary and life itself is revocable.

Nonetheless, the majority opinion concludes the PG&E should not face sanctions for its failure to seek prior approval because this project preceded a decision in which the Commission concluded that projects that produce environmental impacts do not qualify for treatment under General Order 69-C.

Environmental impacts may be a factor supporting compliance with Section 851, but it is not the only factor. A 230 kV transmission project is clearly not a temporary, easily-revocable use. Any reasonable person in PG&E's position would recognize that, and the company should face sanctions for flaunting the law. Because the majority opinion reaches an opposite conclusion, I dissent.

/s/ CARL WOOD
Carl Wood
Commissioner

San Francisco, California
October 28, 2004